**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**

**DIVISION OF SAINT CROIX**

DIANE ROSS,

Plaintiff, Civ. No. 2001/0040

v.

J.P. MORGAN CHASE, CHASE MANHATTAN BANK, CASSAN A. PANCHAM and CECILE R. DEJONGH,

Defendants.

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**ORDER REGARDING PLAINTIFF'S MOTION FOR SANCTIONS**

THIS MATTER came for consideration on plaintiff's motion for sanctions against defendant Chase Manhattan Bank ["Chase"] for its conduct at a Rule 30(b)(6) deposition.[1] Defendant Chase filed opposition to such motion and plaintiff filed a response thereto.

The deponent in this case was Mitchell Gerken, Vice President of Chase. Plaintiff argues that Gerken appeared at the deposition and had little or no knowledge of the subjects outlined in the deposition notice, and was unable to provide relevant, crucial information regarding plaintiff's claims. Plaintiff also claims that counsel for Chase wrongfully advised Gerken not to answer certain questions. Plaintiff seeks sanctions pursuant to Rules 30 and 37 of the Federal Rules of Civil Procedure.

In opposing the motion, Chase admits that Mr. Gerken did not provide answers to some of the questions. Chase explains that when Chase was purchased by FirstBank, some employees with the relevant information left the bank's employ. As a result, Chase was forced to find someone, on staff, who possessed the requested information. According to Chase Mr. Gerken was designated and did some preparation but was unable to address all of the "voluminous"

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[1] Plaintiff's motion identifies thirteen questions which defendant objected to.

discovery requests. Chases claim that Gerken "did his best" and responded in good faith. Plaintiff states that Chase provided inadequate responses to 13 of the 43 requests outlined in plaintiff's Notice of Deposition. Chase counters that some of the questions were overbroad, not relevant, and that plaintiff's questions to the deponent on other topics were outside of the scope of the questions. Chase agrees to supply other missing information at a later date, and to appear, at its own expense, for a subsequent deposition should the court deem it necessary.

DISCUSSION

A corporation which has received notice pursuant to Rule 30 (b)(6) has an affirmative duty to produce a representative who can answer questions that are both within the scope of the matters described in the notice and are "known or reasonably available" to the corporation. *Starlight Intern. Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D.Kan. 1999). Foremost among the purposes of the Rule 30(b)(6) is to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." *Rainey v. American Forest & Paper Ass'n*, 26 F.Supp.2d 82, 95 (D.D.C.1998) (quoting Fed.R.Civ.P. 30(b)(6) advisory committee notes (1970 amend.)) As the Court stated in *Starlight Intern. Inc*.,

> This interpretation is necessary in order to make the deposition a meaningful one and to prevent the sandbagging of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process. The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate [or other organizational] form in order to conduct business.

186 F.R.D. *at* 640.

The sentiment was echoed by the Court in *Black Horse Lane Assoc. L.P. v. Dow*

*Chemical Corp*., 228 F.3d 275, 300 (3d Cir. 2000):

> Rule 30(b)(6) streamlines the discovery process. It places the burden of identifying responsive witnesses for a corporation on the corporation. Obviously, this presents a potential for abuse which is not extant where the party noticing the deposition specifies the deponent. When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.

*See also, Resolution Trust Corp. v. Southern Union Company, Inc.*, 985 F.2d 196 (5th Cir. 1993).

This Court finds that Gerken was inadequately prepared for the deposition. Chase claims that Gerken was not prepared because he did not have the relevant information. Plaintiff notes that Gerken has always worked for Chase and was listed, in Chase's responses to Interrogatories, as an individual with knowledge of the allegations contained in plaintiff's complaint. Additionally, during the deposition, Gerken specifically stated that he prepared for most of the topics identified in the notice by meeting with counsel rather than conducting his own investigation. Gerken was unprepared to answer many of the questions outlined in the deposition notice.

Gerken's statements that the deposition requests were "voluminous" and objectionable are not well taken because he did not request additional time to prepare, neither did he seek a protective order regarding the targets of his objections. Fed.R.Civ.P. 26(c). Gerken was obligated to review all corporate documentation that might have had a bearing on the 30(b)(6) deposition topics. Even if the documents are voluminous and the review of those documents would be burdensome, corporate deponents are still required to review them in order to prepare themselves to be deposed. See, *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co. Inc.*, 201 F.R.D. 33, 37 (D.Mass. 2001).

The rules authorize courts to impose sanctions on a party who fails to adequately prepare for a deposition. Presenting an ill-prepared witness at a 30(b)(6) deposition is tantamount to a failure to appear and triggers the sanctions contained in Rule 37[2]. *Black Horse,* 228 F.3d at 300; *Buycks-Roberson v. Citibank,* 162 F.R.D. 338, 343 (N.D.Ill. 1995); *U.S. v. Taylor,* 166 F.R.D. 356, 362 (M.D.N.C. 1996). Chase's offer to redepose Gerken does not cure the prejudice caused by its conduct. Failure to timely provide discovery is not necessarily purged by belated compliance. *Bartles v. Hinkle,* 472 S.E.2d 827, 838 (W.Va. 1996). The Court in *Starlight Intern* stated that the mere fact that a party later has opportunity to again depose the representative does not cure the initial inadequacy of the witness. *Id. at* 640.

Plaintiff also claims that on a number of occasions, defense counsel advised the deponent

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[2] Rule 37(b) "Failure to Comply With Order
(1) **Sanctions by Court in District Where Deposition is Taken**. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
(2) **Sanctions by Court in Which Action is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; ...
(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; ...
In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

not to answer certain questions. Chase makes no mention of this claim but responds only by stating that some of the discovery was over-broad and burdensome. As a general rule, instructions not to answer questions at a deposition are improper." *Paparelli v. Prudential Ins. Co. of America,* 108 F.R.D. 727, 729 (D.Mass., 1985). Under Rule 30(c), all objections made at the time of the deposition should be noted, but "the examination shall proceed, with the testimony being taken subject to the objections." Rule 30(c). Rule 30(d) provides that any objection during a deposition is to be "stated concisely and in a non-argumentative and non-suggestive manner." Rule 30(d)(1). Moreover, a deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to protect a witness from examination "being conducted in bad faith or in such a manner as to annoy, embarrass, or oppress the deponent or party." *Morales v. Zondo, Inc*., 204 F.R.D. 50, 53 (S.D.N.Y. 2001). “Bare assertions that the discovery requested is overly broad, unduly burdensome, oppressive or irrelevant are ordinarily insufficient . . . to bar production.” *Isaac v. Shell Oil Co. et.al.*, 83 F.R.D. 428, 431 (E.D.Mich. 1979); *General Telephone & Electronics Laboratories, Inc. v. National Video Corp.*, 297 F.Supp.981, 984 (N.D.Ill. 1968); *Pulse Card Inc. v. Discovery Card Services, Inc.*, 1996 WL 397567 *2 (D.Kan. July 11, 1996).

Chase did not identify a privilege, nor was there any evidence that the witness was being harassed by the line of questioning conducted by plaintiff’s counsel. Thus, Chase’s refusal to answer the questions identified in the deposition notice was improper.

SANCTIONS

Generally, a court will impose sanctions where there is dilatory conduct by a party or its counsel. Rule 37 requires that the sanction be “just” and relate to the claim at issue. Sanctions

are meant to compensate a party for actual losses suffered, and the sanction should not necessarily be the harshest permissible one. *Chalmers v. Petty*, 136 F.R.D. 399, 403 (M.D.N.C. 1991). It is clear that Chase failed to prepare Gerken for the deposition. Such lack of preparation has resulted in lost time and money for the plaintiff. Chase's apparent contrition notwithstanding, the court finds that upon consideration, fairness dictates that Chase be directed to provide the requested information, at its expense.

Accordingly, it is hereby ORDERED AS FOLLOWS:

1. Within ten (10) days of date of this Order the parties shall confer and agree on a date to redepose Mr. Gerken in St. Croix.

2. The scope of such deposition shall include topics numbered 3, 6, 9, 12, 15, 18, 19, 21, 23, 39, 40, 41, & 46. Topic No. 23 shall be limited to employees and Topic No. 39 shall be limited as proposed by Chase in its opposition to the motion. Mr. Gerken must testify to <u>all matters known or reasonably available to Chase</u> which may necessitate some gathering of documents and information and having Mr. Gerken review and become familiar with the documents and information. (See, e.g., cases cited above, and *Poole v. Textron, Inc.*, 192 F.R.D. 494 (D.Md. 2000); *Media Services Group, Inc. v. Lesso Inc*, 45 F.Supp. 1237 (D.Kan. 1999); and *Alexander v. F.B.I.* 186 F.R.D. 148 (D.D.C. 1999) in such regard). To the extent any matters remain unknown after such reasonable inquiry Mr. Gerken may so aver. Mr. Gerken need not reiterate testimony previously given except as shall be necessary for coherence and continuity.

3. Chase shall pay all expenses of such deposition including plaintiff's copy of the

transcript and shall pay plaintiff's attorney the sum of $500.00 as and for partial attorney's fees.

Dated: October 30, 2003 ENTER:

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JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:
Wilfredo F. Morales, Clerk of Court
by:_____
Deputy Clerk

cc: Lee J. Rohn, Esq.
Charles Engeman, Esq. (FAX 714-1245)